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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

PONCA TRIBE OF NEBRASKA; INTERTRIBAL STRATEGIC VENTURES;

Petitioners,

vs.

CALIFORNIA DEPARTMENT OF INSURANCE,

Respondent,

On Petition for Writ of Certiorari
To the California Court of Appeals, Fourth District

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

This case presents an issue of first impression to this Court: whether a state regulatory agency can enforce an administrative subpoena directed to a financial institution seeking the financial records of an Indian tribe and a tribal entity formed pursuant to the authority of that tribe. A California court has determined that a state statute granting insurance regulators general subpoena powers trumps the long-recognized constitutional doctrine of tribal sovereign immunity. The issues presented in this petition for writ of certiorari are:

Whether the tribal sovereign immunity doctrine arising from the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause of the United States Constitution permits a state, through subpoena, to compel a Native American tribe and tribal entity to allow disclosure of financial records maintained by a bank or other depository institution such as Bank of America.

Whether the tribal sovereign immunity doctrine arising from the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause of the United States Constitution is waived or otherwise not recognized where a tribe or tribal entity does business off-reservation or with non-Indians.

Whether the tribal sovereign immunity doctrine arising from the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause of the United States Constitution is waived or otherwise not recognized when tribal financial records are maintained by a bank or other depository institution such as Bank of America.

II. LIST OF PARTIES

Ponca Tribe of Nebraska, a federally-recognized Indian tribe, and Intertribal Strategic Ventures, a venture formed pursuant to the authority of participating Indian tribes, Petitioners

California Department of Insurance, Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Ponca Tribe of Nebraska, a federally-recognized Indian tribe, and Intertribal Strategic Ventures, an entity formed pursuant to the authority of participating Indian tribes, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals, District Four, of the State of California, entered on January 15, 2004, denying Petitioners' application for writ of mandate, seeking an order directing the Riverside County Superior Court to strike its denial of Intertribal Strategic Ventures' motion to quash an administrative subpoena directed to Bank of America seeking its financial records, and to enter a new order granting such motion. Enforcement of the subpoena is currently stayed by order of the Riverside Superior Court through April 7, 2004. Petitioners are concurrently filing an application for further stay with the Hon. Sandra Day O'Connor pending certiorari.

OPINION BELOW

The decision below was a summary denial, without further opinion, of a petition for writ of mandate by the Court of Appeals of the State of California, Fourth District. It was not published. The case was styled *Ponca Tribe, et al. v. Superior Court*, Case No. E035007. The decision was entered January 15, 2004. The California Supreme Court denied the petition for review, Case No. S122025, filed by the Petitioners on February 4, 2004 without opinion.

JURISDICTION

The decision of the California Court of Appeals was entered January 15, 2004. Review was denied by the California Supreme Court on February 4, 2004. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 2 of the United States Constitution:

"The Congress shall have Power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;..."

Article II, Section 2, of the United States Constitution:

"[The President] shall have Power, by and with the advice and consent of the Senate, to make Treaties..."

Article VI, Clause 2, of the United States Constitution:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

STATEMENT OF THE CASE

The Ponca Tribe of Nebraska (hereinafter "Ponca Tribe") is a federally-recognized Indian tribe headquartered in Lincoln, Nebraska. The Ponca Tribe operates under a constitution consistent with the federal Ponca Restoration Act, *25 U.S.C. §983 et seq.*, signed into law October 31, 1990. The Ponca Restoration Act allows for the formation of tribal government and development of an economic plan, but precludes the establishment of a reservation on any land acquired by or for the tribe. *25 U.S.C. §§983b, 983f, 983h.*

Intertribal Strategic Ventures (hereinafter "Intertribal") was formed as a cooperative venture of participating Indian tribes. On July 26, 2003, the Ponca Tribal Council, the governing body for the Ponca Tribe, approved a resolution adopting the charter of Intertribal Strategic Ventures and agreeing to become the first participating member in Intertribal.

Under Intertribal's charter, the participating tribes confer upon Intertribal their sovereign immunity to the same extent that the tribes would have sovereign immunity if they engaged in the activities undertaken by the company. The Ponca Tribe is the only tribe presently participating in Intertribal. Intertribal is wholly-owned and governed by its member tribes, and is formed solely for the purpose of promoting sovereignty and creating economic opportunities for its member tribes.

All net proceeds from Intertribal are used to further its member tribes' self sufficiency and fund services for their members, including education, social services, cultural services, conservation, and medical and dental care. Proceeds also fund the Northern Ponca Buffalo Program. The Ponca Tribe, which has no casino gambling operation, relies heavily on revenues from Intertribal to provide these critical services.

Intertribal is engaged in the employee staffing business, doing business under various trade names. On July 28, 2003, the Board of Directors of Intertribal voted to undertake the operations of First American Staffing, a professional employee staffing company. Since July 28, 2003, First American Staffing has been a trade name under which Intertribal has done business on behalf of its member tribes. During the relevant time period, First American Staffing maintained a bank account at a Bank of America branch in Palm Desert, California.

In the summer of 2003, Respondent California Department of Insurance ("CDI") purported to commence an investigation into Intertribal on the grounds that First American Staffing, before becoming part of Intertribal, was allegedly offering workers' compensation insurance without being a California-licensed workers' compensation carrier. CDI claimed this was in violation of various California statutes.

A California statute, *Cal. Insurance Code §12924(a)* confers upon the Insurance Commissioner a general power to subpoena records relating to the business of insurance. On

August 5, 2003, after First American Staffing was taken over by Intertribal, CDI served an administrative subpoena on the custodian of records for Bank of America requiring the bank to produce Petitioners' financial records. The subpoena was signed by Insurance Commissioner, John Garamendi.

On August 20, 2003, Intertribal filed a lawsuit in the Superior Court for the County of Riverside, Case No. INC037724, seeking injunctive relief and a declaration of rights concerning the extent to which CDI could regulate and investigate Intertribal. Concurrent with the lawsuit, Intertribal filed a motion to quash the administrative subpoena. The grounds for the motion were that Intertribal was a sovereign tribal entity and was immune from subpoena under the Constitution and such authorities as *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992)(tribes immune from subpoena).

CDI filed an opposition to the motion to quash which argued that *Ins. Code §12924(a)* gave the Insurance Commissioner general authority to subpoena documents relating to insurance. CDI did not dispute that *James* and similar authorities recognized tribal immunity from subpoena; rather, the agency argued that tribal immunity did not apply because the tribe was doing business off reservation and the records were maintained by an off-reservation bank. CDI did not discuss or analyze the U.S. Supreme Court decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 759, 118 S.Ct.1700, 140 L.Ed.2d 981, which unequivocally held that tribal immunity exists even where a tribe engages in commercial activities off reservation. Rather, CDI relied upon a line of federal cases, including *Moe v. Salish & Kootenai Tribes* (1976) 425 U.S. 463 and *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, which allowed states to impose "minimal burdens" to collect taxes (from the consumer) where tribes were selling cigarettes to non-Indians.

On December 4, 2003, the Riverside County Superior Court, the Hon. Christopher J. Sheldon presiding, heard the arguments of counsel. The court indicated that its tentative ruling was to deny the motion because, the judge said, "I think that the Department of Insurance has a right to regulate insurance in this state". After taking the matter under submission, on December 8, 2003, the court issued a one sentence ruling denying Intertribal's motion to quash: "Motion t/Quash Subpoena Issued by Dept of Ins is DENied (sic)."[1]

The Ponca Tribe and Intertribal presented a petition for writ of mandate with the California Court of Appeals, Fourth District, on December 30, 2003. Based on the tribes' constitutional sovereign immunity, the petition sought an order directing the trial court to strike its order denying the motion to quash and enter a new order granting the motion and requested an immediate stay of the subpoena. On December 31, 2003, the Court of Appeals issued a temporary stay order; however, it later summarily denied, without opinion, the petition for writ of mandate and lifted the stay. A petition for review on sovereign immunity grounds was denied by the California Supreme Court, again without opinion, on February 4, 2004[2].

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[1]The text of the orders of the trial court, the Court of Appeals, and Supreme Court are set forth in the appendix.

[2]It is important to note that in California, neither a summary denial of a petition for writ of mandate (that is, a denial of a writ petition without opinion) nor a Supreme Court's denial of review are decisions on the merits. *Trope v. Katz* (1995) 11 Cal.4th 274, 287 (denial of review not afforded any legal significance, and is not an expression of opinion by the Supreme Court on the correctness of the court of appeals' action); *Kowis v. Howard* (1998) 60 Cal.App.4th 1053, 1064 (summary denial of petition for writ of mandate is not a decision on merits).

On March 3, 2004, the Riverside County Superior Court issued a temporary stay of enforcement of the subpoena to allow this petition to be filed. That stay expires April 7, 2004.

REASONS FOR GRANTING THE WRIT

1. Introduction

The United States Constitution grants the federal government exclusive control over Indian affairs, not subject to interference or diminution by the states. This exclusive and plenary control results in a long-standing recognition by this Court and other federal and state authorities that Native American tribes and tribal entities enjoy absolute immunity from state attempts to confer enforcement jurisdiction over tribes, including immunity from suit, subpoena, and other judicial and quasi-judicial processes. Existing law on this subject is very clear: Indian tribes and tribal entities are not subject to suit or subpoena absent an express, unequivocal waiver by the tribe or by Congress. It is also well-settled that tribal immunity applies to all tribal commercial conduct, whether on or off a reservation.

This petition presents a question that has not been answered by this Court or any California court: whether the constitutional immunity from subpoena protects tribes from being compelled to disclose sensitive financial records maintained in an off-reservation financial institution. Lower federal courts have recognized immunity protection from disclosure of such sensitive tribal records as documents evidencing patient treatment, and tribal employment records. Financial records, which unquestionably are just as sensitive as these types of records, are equally if not more deserving of protection; however, if the lower court ruling is allowed to stand, this protection will be lost merely because financial records were prudently deposited with a bank.

At least one federal court has recognized that tribal protection of its financial records should not be lost merely because those records are held by a bank and not the tribe itself. *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 92 (S.D.N.Y. 2002). The logic of *Catskill* is persuasive on this issue: since sovereign immunity would preclude subpoenaing these records directly from the tribe, this immunity should not be lost merely because the tribe has entrusted such records to a bank. Adoption of that rationale is necessary to prevent a loophole in the immunity rule, and to protect tribal financial records that are necessary to protect the ability of tribes and tribal entities to govern themselves without interference from the state.

This petition therefore presents an issue of great importance to all Native American tribes, since few if any tribes operate on-reservation financial institutions and must rely upon off-reservation institutions to meet their banking and financial needs. This is especially true for tribes such as the Ponca Tribe, which have no reservation and therefore by definition must maintain their finances off reservation.

This petition also underscores the tension which can sometimes arise between Native American tribes and state regulators when the tribes engage in commercial operations, whether on or off reservation. Nowhere is this tension more acute in California, which has a lengthy history of disputes between tribes and regulators over the extent to which tribal conduct can be regulated by the state[3]. The problem is becoming more severe in California, as state courts and

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[3]As an example, in 1987 this Court ruled that tribal immunity precluded state officials from regulating on-reservation tribal gaming operations. *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 107 S.Ct.1083, 94 L.Ed.2d 244.

regulatory agencies are increasingly disregarding the exclusive authority of Congress and the federal government to regulate relations with Indian tribes and are unilaterally absolving themselves from their duty to respect this immunity.

In the present case, the state court failed to recognize that federal law alone governs relations with Indian tribes and that federal authorities such as *U.S. v. James* protect tribes from the state's subpoena power. Rather, the court simply gave deference to the CDI's claim that it needs to regulate "insurance"[4]. Just weeks ago, a California appellate court went so far as to deny that tribal immunity has any basis in the Constitution, but is merely a figment of "federal common law" which can be disregarded to protect a state's political process. *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2004) ____ Cal.App.4th ___, 2004 WL 389462 (holding the state can sue a tribe under a state statute for not disclosing political contributions).

In short, California no longer considers itself bound by the directives of this Court on a matter that is unequivocally within the exclusive purview of federal law. As Native American tribes and tribal entities increasingly integrate into the economy through off-reservation business ventures, this Court's review and guidance is necessary to define the proper limitations of state authority over tribes and tribal entities.

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[4]Remarkably, CDI provided no admissible evidence that Intertribal was engaged in the business of insurance.

2. The Sovereign Immunity Protection Arising From the Federal Government's Exclusive Control Over Indian Affairs Under the Constitution Precludes State Agencies From Exercising Subpoena Jurisdiction Over Tribes and Tribal Entities

The erroneous statements of the California appellate court aside, it is undeniable that tribal immunity arises from the exclusive control over Native American affairs granted to the federal government under the United States Constitution. The Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause have long been recognized to give Congress, rather than the states, "plenary and exclusive" control over relations with Native Americans. *United States Constitution, Art. I, Sec. 8, cl. 3; Art. II, Sec. 2; Art. VI, cl. 2; Bryan v. Itasca County, Minnesota* (1976) 426 U.S. 373, 376, 96 S.Ct. 2102, 48 L.Ed.2d 710, fn. 2. Federal courts recognize that these constitutional provisions preempt state authority over Indian tribes, and that Indian relations are "the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of New York State* (1985) 470 U.S. 226, 234, 105 S.Ct.1245, 84 L.Ed.2d 169, *McClanahan v. State Tax Commission of Arizona* (1973) 411 U.S. 164, 172, 93 S.Ct. 1257, 36 L.Ed.2d 129.

A key attribute of the federal government's exclusive control over Indian affairs is that tribes and tribal entities have enjoyed immunity from state court processes and other attempts to confer enforcement jurisdiction over tribes and tribal entities. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 759, 118 S.Ct.1700, 140 L.Ed.2d 981 (tribal immunity "is a matter of federal law" subject to Congress' constitutional ability to limit it through explicit legislation). Thus, it is well-recognized under federal law that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754.

Because tribal immunity is a matter of federal law, it is "not subject to diminution by the states". *Id.* at 756; *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering* (1986) 476 U.S. 877, 891, 106 S.Ct.2305; 90 L.Ed.2d 881 ("in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."). It is also clear under federal law that sovereign immunity protects Indian nations from all state attempts to assert enforcement jurisdiction, even where tribes and tribal entities are otherwise subject to some level of state regulation. *Kiowa, supra,523 U.S. at 755; Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (1991) 498 U.S. 505, 514, 111 S.Ct.905, 112 L.Ed.2d 1112.

Thus, federal courts have held that Indian tribes and tribal entities are not subject to the subpoena power of the state and are immune from court processes. In *United States v. James, supra*, the Ninth Circuit held that a federal statute giving federal district courts jurisdiction over certain crimes committed on reservation "did not address...the amenability of the tribes to the processes of the court in which the prosecution is commenced"[5]. The court held that an Indian tribe was therefore immune from a district court subpoena requiring the tribe's director of social services to produce records pertaining to an alleged rape victim.

In accord is *Bishop Paiute Tribe v. County of Inyo*, 291

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[5]*James* can be contrasted with *United States v. Boggs*, 493 F.Supp.1050 (D.Mont. 1980). In *Boggs*, the district court held that Congress could, through enactment, subject Indian tribes to federal grand jury subpoenas. This ruling is consistent with the long-standing rule, re-stated in *Kiowa*, that Congress can waive sovereign immunity. The *Boggs* factual situation is not presented by this petition, as this case involves jurisdiction of a state agency, not the federal government.

F.3d 549 (9th Cir. 2002), *rev. on other grounds* in *Inyo County, CA v. Paiute-Shoshone Indians of the Bishop Community* (2003), 538 U.S.701, 123 S.Ct. 1887, 155 L.Ed.2d 933[6]. *Bishop Paiute* held that a California prosecutor could not compel a business entity of a federally-recognized Indian tribe (a tribally-chartered gaming corporation) to disclose employment records pursuant to a search warrant where the prosecutor was investigating potential welfare fraud by some of the tribe's employees. *See also Catskill Development, LLC, supra* (sovereign immunity precluded the court from enforcing third-party subpoenas directed to a tribal gaming corporation)[7].

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[6]This Court's basis for reversal was that the action was for civil rights violations under 42 U.S.C. §1983, and the tribe did not qualify as a "person" under that statute. The decision did not address the Ninth Circuit's discussion of sovereign immunity.

[7]This Court's decision in *Nevada v. Hicks* (2001) 533 U.S. 353, 121 S.Ct.2304, 150 L.Ed.2d 398, is not to the contrary. The issue in *Hicks* was whether state officials could enter onto tribal land to serve a search warrant directed to a tribal member, not an entity, living on reservation. The Court found that the officials' entry onto the tribal lands for the limited purpose of serving process on the individual, with the blessing of the tribal court, did not impact the tribe's ability to govern itself and did not violate sovereign immunity. It is well-settled that a tribe's sovereign immunity does not extend to individual Indians. *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992). Thus, *Hicks* is not authority for the proposition that a state official can enter a reservation for purposes of serving a subpoena seeking tribal records absent tribal waiver or an act of Congress.

3. The State Can Not Overcome Tribal Immunity Through Legislative Enactment

CDI has consistently recognized throughout the litigation that the Ninth Circuit holdings in *James* and *Bishop Paiute* confer upon tribes immunity from state attempts to confer jurisdiction over them through subpoena. Rather, CDI argued, and the trial court agreed, that it was entitled to enforce its administrative subpoena because a state statute, *Ins. Code §12924(a)*, conferred upon the Insurance Commissioner a broad general subpoena power over matters pertaining to insurance[8]. CDI did not argue that the Ponca Tribe consented to such jurisdiction or that Congress had specifically granted the Insurance Commissioner subpoena power over Native American tribes[9].

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[8]The relevant portion of *Ins. Code §12924* reads: "The commissioner may issue subpoenas and subpoenas duces tecum for witnesses to attend, testify and produce documents before him, on any subject touching insurance business, or in aid of his duties. Such process may be served, obeyed, and enforced as provided in the Code of Civil Procedure for civil cases."

[9]At the trial court and intermediate appellate court, CDI argued that the federal McCarran-Ferguson Act, *15 U.S.C. §§1011-1015*, which generally grants states the ability to regulate insurance, preempted tribal immunity by authorizing states to regulate insurance. No language in the act, however, implicitly, much less explicitly, purports to waive tribal immunity with respect to any insurance matter. "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58, 98 S.Ct.1670, 56 L.Ed.2d 106. CDI abandoned the McCarran-Ferguson preemption argument in its state Supreme Court briefing.

As noted above, relations with Native American tribes are strictly a matter of federal law under our Constitution As a result, this Court has recognized that tribal immunity, the product of those constitutional provisions, is "not subject to diminution by the states". *Kiowa, supra,* 523 U.S. at 756. Thus, the states do not have the right or the power to grant themselves jurisdiction over Indian tribes. As one federal court opined, "The only entities that can determine the extent to which the immunities and protections are afforded to tribes are Congress and the applicable tribes themselves. The state legislatures have no such right." *Multimedia Games, Inc. v. WLGC Acquisition Corp.* (N.D. Okla. 2001) 214 F.Supp.2d 1131, 1141 (emphasis added).

Sovereign immunity "is dependent upon, and subordinate to, only the Federal Government, not the States". *Cabazon, supra,* 480 U.S. 202 at 207. Neither the California Legislature nor the state Insurance Commissioner (an elected official), can unilaterally confer upon themselves jurisdiction to subject an Indian tribe or tribal entity to a subpoena[10].

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[10]CDI also posed the argument that it should be entitled to production of the tribe's financial records to determine whether Intertribal is truly a tribal entity entitled to assert its immunity claim. The speciousness of this circuitous argument is obvious: CDI claims it can violate sovereign immunity as part of its investigation into whether Intertribal is protected by sovereign immunity. This argument should be rejected out of hand by this Court as illogical.

4. That The Tribal Entity Does Business Off-Reservation Has No Bearing on Immunity From Subpoena

CDI also argued that Petitioners were not entitled to assert sovereign immunity because they were doing business with non-Indian California businesses off reservation. Essentially, CDI believes that any Indian tribe or nation doing business off reservation is subject to the full panoply of the state's enforcement powers, including subjection to subpoena.

This contention ignores the clear teachings of federal law, which holds that sovereign immunity applies even where a tribe conducts its business off reservation[11]. This point was made clear by this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., supra.* In *Kiowa*, a non-Indian payee brought a suit in state court to recover on a promissory note executed by the tribe. The note was intended to secure the tribe's purchase of stock, but indicated that it was executed and delivered in Oklahoma City, off tribal lands, and obligated the tribe to make its payments in that city. When the tribe admittedly defaulted on the note, the payee sued in state court; however, this Court held that sovereign immunity protected the tribe from suit even though the conduct took place off reservation. "To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred...Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id. at 754, 760* (emphasis added).

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[11]This is especially true where, as here, the Ponca Tribe has no reservation and is precluded from establishing one under the Ponca Restoration Act. If CDI's argument is accepted, the Ponca Tribe would enjoy no immunity, since all of its commercial activity, by definition, takes place off reservation.

Kiowa was not the first case holding that tribes could not be sued for off-reservation conduct. Several federal authorities prior to *Kiowa* held that sovereign immunity applied to tribes' off-reservation conduct. *Puyallup Tribe, Inc. v. Department of Game of State of Washington* (1977) 433 U.S. 165, 172-173, 97 S.Ct. 2616, 53 L.Ed.2d 667; *In re Greene*, 980 F.2d 590, 593-597 (9th Cir. 1992)("Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component."). (Emphasis Added)

The long-established rule followed and expounded upon in *Kiowa* has been widely followed. For example, in *Bassett v. Manshantucket Pequot Tribe*, 204 F.3d 343 (2nd Cir. 2000), the court held that an Indian tribe which had entered into a contract with a film producer could not be sued for federal copyright violations. Before the recent *Agua Caliente* decision, even California courts had recognized that tribal immunity extends to off-reservation conduct. *Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384, 105 Cal.Rptr.2d 773.*

Ignoring the clear dictates of these authorities, however, CDI and apparently the lower court relied upon a series of inapplicable federal cases which granted state authorities the right to impose "minimal burdens" on tribes to collect state taxes arising from business transactions with non-Indians. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation* (1976) 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96; *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10. Both *Moe* and *Colville* hold that states, in furtherance of their regulatory powers over non-Indians, could require tribes to collect sales taxes on sales of cigarettes to non-Indians. In both cases, the impetus for this limited grant of regulatory authority was that this minimal burden was necessary to ensure that non-Indians did not commit wholesale violations of state

law by evading their obligations to avoid income taxes.

Since these authorities allow the state some regulatory authority over tribal business transactions with non-Indians, the lower court decision, if allowed to stand, would open a giant loophole in the immunity rule. If immunity can be waived under state law and in furtherance of state regulatory authority, then states can subject tribes and tribal entities to every manner of subpoena, warrant, suit, or any other means at their disposal under the guise of exercising such authority.

In effect, the lower court has overruled *James, Bishop Paiute, Kiowa*, and every other authority of this and other federal courts which recognize the distinction between regulatory authority and enforcement jurisdiction – the ability of the state to use judicial and quasi-judicial processes to assert jurisdiction over tribes and tribal entities. Supreme Court authority, however, very clearly delineates these two forms of jurisdiction. *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (1991) 498 U.S. 505, 111 S.Ct. 905, the last of the line of cigarette taxation cases, which was never discussed by CDI at the trial court level, holds that even where a state has some regulatory authority over a tribe, it may never sue a tribe to compel compliance with that authority.

The tribe in *Potawatomi* sold cigarettes at a convenience store located off reservation but on lands held in trust for it by the federal government. The tribe did not collect state sales taxes. The litigation was an action by the tribe to enjoin an assessment issued by the state tax commission. The commission counterclaimed to enforce the assessment, but this counterclaim was dismissed by the lower court on sovereign immunity grounds.

This Court, relying upon *Moe* and *Colville*, upheld the obligation of the tribe to assist the state in collecting validly-imposed sales taxes on cigarette sales to non-Indians. However, the Court held that sovereign immunity precluded the state from

suing to enforce the obligation to collect such taxes, and upheld the lower court's dismissal of the counterclaim. The arguments made by the state in *Potawatomi* and the Court's analysis and rejection of same is most noteworthy here:

> "Oklahoma offers an alternative, and more far-reaching, basis for reversing the Court of Appeals' dismissal of its counterclaims. It urges this Court to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity. Oklahoma contends that the tribal sovereign immunity doctrine impermissibly burdens the administration of state tax laws...The sovereignty doctrine, it maintains, should be limited to the tribal courts and the internal affairs of tribal government, because no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws.
>
> "A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine. These Acts reflect Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development. Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign

immunity." *Id.* at 909-910 (internal citations and quotations omitted). (Emphasis Added)

In so ruling, *Potawatomi* rejected the state's argument that the holding would give it a "right without a remedy":

> "In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores. States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress." *Id.* at 514 (citations omitted).

This Court, in *Potawatomi*, recognized the difference between regulators' right to enforce a state's taxation authority over consumers of cigarettes and their ability to take coercive actions against the tribal sellers. Subsequent federal decisions have agreed that "cases allowing States to apply their substantive laws to tribal activities occurring outside Indian

country or involving nonmembers have recognized that tribes continue to enjoy immunity from suit". *Kiowa, supra,* 523 U.S. at 751[12].

This point has been made outside the context of cigarette sales. *Puyallup Tribe, Inc. v. Department of Game of State of Washington, supra,* was an action by the state of Washington against a federally-recognized Indian tribe and several of its members to regulate the number of steelhead trout the tribe could fish from the state's rivers. After protracted litigation, a state court entered an order against the tribe limiting the tribe's catch of trout and ordering the tribe to provide a list of its members authorized to catch the fish and to report to the state the number of trout caught on a weekly basis. While this Court noted that the litigation was properly brought against the individual defendants and that the state could limit their take of steelhead, the Court had little trouble finding that the state court's order was void as to the tribe and that its sovereign immunity argument was "well-founded": "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." 433 U.S. at 172.

These cases make very clear that whatever regulatory authority is conferred on a state for off-reservation conduct, such authority does not include coercive actions against the tribes such as lawsuits or subpoenas. Tribes and tribal entities enjoy sovereign immunity even where the state has some regulatory authority. In short, the constitutional doctrine of

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[12]*See also California State Board of Equalization v. Chemehuevi Indian Tribe* (1985) 474 U.S. 9, 106 S.Ct.289 (in a summary disposition, this Court held that an Indian tribe could be made to collect taxes from non-Indian cigarette purchasers, but upheld a Ninth Circuit holding that the tribe could not be sued by the state for back taxes).

sovereign immunity protects the Ponca Tribe and Intertribal from CDI's subpoena seeking its financial records.

5. Petitioners' Sovereign Immunity Protects Disclosure of Their Financial Records In the Possession of an Off-Reservation Bank

While Petitioners' immunity from subpoena is well-established under existing federal law, this case presents an issue of first impression in federal appellate jurisprudence: whether sovereign immunity from a state agency's subpoena applies where, as here, the tribe's subpoenaed records are in the possession of a third-party, off-reservation financial institution such as Bank of America. The importance of this issue cannot be underestimated. Consideration of the rationale in support of tribal immunity from subpoena, and a paramount need to protect the self-determination and self-government of Indian tribes and tribal entities (especially a tribe like the Ponca Tribe, which does not operate a casino and relies extensively on Intertribal as a major source of income), compels the conclusion that sovereign immunity must protect disclosure of tribal financial records, even where those records are held by a bank.

The Ninth Circuit's discussion of tribal sovereign immunity from a search warrant in the *Bishop Paiute* case is instructive[13]. That court found that protection of a tribal entity's employment records was necessary to preserve the tribe's right to self-determination and self-government:

> "The Tribe established reasonable policies concerning the <u>confidentiality</u> of employee records, which in many instances were

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[13]This discussion in *Bishop Paiute* is not impacted by this Court's later reversal on procedural grounds.

based on federal and state guidelines. The Tribe asserts that such policies are necessary to encourage truthfulness and accuracy in Casino employee records. As one of the only means by which the Tribe can generate income and be self-sufficient, management of the Casino is uniquely part of the Tribe's government and infrastructure. Indeed, all governments create policies and procedures for the protection of their records. Undoubtedly, California's sovereign immunity would be compromised if the United States demanded that the State follow procedures other than those adopted by the state policymakers. Moreover, at issue is not just the Tribe's right to protect the confidentiality of its employee records, but the more fundamental right of the Tribe not to have its policies undermined by the states and their political subdivisions. We conclude that the execution of a search warrant against the Tribe interferes with the right of reservation Indians to make their own laws and be ruled by them." *Bishop Paiute, supra,* 291 F.3d at 558 (internal citations and quotations omitted)(emphasis added).

To emphasize these points, the same court later said:

"The enforcement of tribal policies regarding employee records is an act of self-government because it concerns the disclosure of tribal property and because it affects the Tribe's main source of income...The Tribe's employment policies also affect the Casino, the Tribe's predominant source of economic development revenue." *Id.* at 559.

Similarly, the *James* court cited to an important tribal interest in holding that the tribe, which enjoyed sovereign immunity from subpoena, did not waive immunity through a limited production of documents pertaining to the mental and emotional problems of a tribal member:

> "There is an increased privacy interest on the part of tribal members in documents which detail emotional, mental, or physical problems of tribal members, more so than in documents which only refer to such problems in a general way. The tribal interest arises in protecting the details of the counseling from disclosure in order to promote free communication by tribal members needing those services." *James, supra*, 980 F.2d at 1320.

There can be no doubt that the interests of tribal self-government and self-determination require that courts afford at least as much protection to tribal financial records as they do to the employment and mental health records implicated in the Ninth Circuit decisions. This is especially true where, as here, participation in Intertribal is vital to the Ponca Tribe's ability to provide social, cultural, medical, and other services to its members. Participation in Intertribal, and protection of Intertribal's financial records, is necessary to maintain the Ponca Tribe's right to make its own laws and be ruled by them.

Since it cannot be disputed that Indian tribes have a strong governmental interest in protecting their financial records, it remains for this Court to determine whether that interest should be compromised merely because the financial records are maintained by a bank. CDI repeatedly argued that Petitioners were not entitled to assert sovereign immunity for that very reason. According to CDI, even if it lacked jurisdiction over Petitioners to issue a subpoena seeking its banking records, it did have jurisdiction to subpoena those

records from Bank of America, the nation's largest bank. This argument, unsupported by existing law, should be rejected by this Court because it creates an unacceptable loophole to the immunity rule which would render immunity a practical nullity. It is a loophole that if not addressed, will establish a state's unfettered right to obtain tribal banking records from financial institutions nationwide.

It is well recognized under federal law that tribal immunity applies to agents of the tribe. *See Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir. 1996)(a tribe's attorney, when acting as a representative of the tribe and within the scope of his authority, is cloaked in the immunity of the tribe in the same manner as a tribal official is cloaked with such immunity). Up until the present case, this has also been the rule in California. *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1157. Thus, when a bank undertakes to act as a repository of tribal funds and maintain tribal financial records, it is acting under the authority of the tribe as the tribe's agent. Thus, for subpoena immunity purposes, Bank of America should be regarded as any other tribal agent acting within the course and scope of its authority, and it should not be forced to disclose tribal financial records.

More fundamentally, immunity from subpoena should be recognized for financial records held by a bank because without such recognition immunity would be a fiction. Few if any tribes maintain their own financial institutions, and thus have little choice other than to maintain their funds in an off-reservation bank. Moreover, a tribe such as the Ponca Tribe, which does not have a reservation, can not maintain their records on a reservation, and has no choice but to keep their finances with a bank.

In *Catskill Development, LLC, supra*, the district court quoted a federal magistrate who recognized this absurdity in quashing a deposition subpoena seeking tribal financial records

from Key Bank:

> "Clearly, based upon the Court's previous ruling...had plaintiffs subpoenaed *the Tribe* demanding that it produce these bank records, the Tribe's sovereign immunity would prevent enforcement of the subpoena. The outcome does not change simply because the subpoenaed documents are held by a third party and not by the Tribe itself." *Catskill Development, LLC, supra*, 205 F.R.D. at 92 (emphasis in original)

Catskill's logic is compelling. If the holding in this case is allowed to stand, then no immunity exists for the financial records of any tribe, for the sole reason that they are prudently depositing their funds with a bank.

Unfortunately, although existing authorities logically would preclude enforcement of a subpoena directed to a bank holding tribal financial records, no federal appellate court has expressly so stated. If review is here denied, it would signal state regulators that they have *carte blanche* to subpoena any tribal financial records held by a bank, which would obviate any protection which the tribal immunity doctrine would otherwise afford the tribes. Review is necessary to prevent such an unfair result which would hamper, if not destroy, the ability of tribes further their self-government and self-sufficiency.

6. Review Is Necessary to Prevent Further Violations of Sovereign Immunity and to Instruct State Officials on the Limits of Their Authority

Sadly, California courts have recently shown that they are increasingly willing to whittle away at the sovereign immunity rule. Although this Court has allowed states limited grants of regulatory power (as in the cigarette taxation cases), its decisions have continuously recognized that immunity from state attempts to confer upon themselves enforcement jurisdiction, through suit, subpoena, and similar means, is absolute absent waiver by the tribe or Congress. California, however, not only fails to recognize the immunity from subpoena, but as evidenced by the recent *Agua Caliente* decision, *supra*, is even creating exceptions to the long-standing doctrine of immunity from suit. By creating judicial exceptions to this absolute immunity, California courts are violating federal law and the directives of this Court.

These violations should not be viewed as isolated instances. As this Court has recognized, Indian tribes are increasingly integrating themselves into the nation's economy. *Kiowa, supra*, 523 U.S. at 758 (noting tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians). Within the last year, several Indian tribal ventures besides Intertribal have entered the employee staffing business, including some temporary agencies and some which provide employees on a permanent basis.

As tribes assimilate into the economy at large, as they are doing in ever-increasing numbers, they frequently are at loggerheads with state regulators who distrust the tribal enterprises and the inapplicability of state law to those enterprises. State officials' perceived need to regulate tribal conduct off reservation conflicts with federal policies in favor of leaving tribes largely free from state jurisdiction and control.

McClanahan v. Arizona State Tax Comm'n. (1973) 411 U.S. 164, 168, 93 S.Ct.1257, 36 L.Ed.2d 129.

The tension between tribal sovereignty and the perceived need for state regulation of off-reservation conduct has resulted in judicial challenges to continued tribal immunity. As noted above, in *Potawatomi, supra*, this Court rejected a request by state regulators to limit tribal immunity to on-reservation matters and "internal affairs of tribal government". More recently, the same challenge was made to the *Kiowa* court, which similarly refused to limit tribal immunity on the grounds that it was solely within Congress' power, rather than its own, to do so:

> "There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
>
> "These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw

> this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment." *Kiowa*, supra, 523 U.S. at 758 (internal citations omitted)(emphasis added).

Thus, California courts are now doing what this Court has consistently refused to do: they are unlawfully placing limitations on tribal immunity. This Court, unlike the state courts, has recognized that Congress, and Congress alone, has the authority to limit or abrogate tribal immunity. Since this Court lacks authority to judicially limit the immunity doctrine, it is more than certain that state courts similarly lack such authority (especially noting that immunity is a matter of federal, rather than state law), and that in attempting to do so state courts are usurping the "plenary and exclusive" power of Congress to regulate Indian affairs. *Bryan, supra*, 426 U.S. at 376.

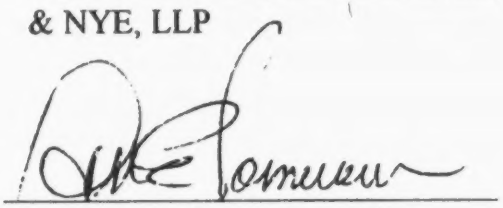
CONCLUSION

Protection of tribal immunity and the uniform application of federal law relating to immunity among the states require that this Court review the California Court of Appeals' summary denial of Petitioners' request for writ of mandate. For the reasons set forth above, this writ of certiorari should be granted.

Respectfully submitted.

Dated: March 29, 2004

ROXBOROUGH, POMERANCE, & NYE, LLP



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APPENDIX

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF RIVERSIDE
SUPERIOR COURT OF CALIFORNIA
CIVIL MINUTE ORDER

CASE NO. 037724 DATE: 12/08/03 DEPT.: 2H
CASE NAME: INTERTRIBAL STRATEGIC VENTURES VS CA DEPT OF INS
CASE CATEGORY: Declaratory Relief
HEARING: Ruling on Matter Submitted 12/04/03 RE: Motion to Quash Subpoena

****

Honorable JUDGE Christopher J. Sheldon, Presiding

Clerk: M. Dinius

Court Reporter: None

Having Considered the Submitted Matter the court rules as follows:

Motion t/Quash Subpoena Issued by Dept of Ins is DENIED

Matter is stayed until 12/31/03

Formal Order to be prepared, served and submitted by counsel for Defendant

Notice to be given by Clerk

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

FILED
JANUARY 15, 2004
COURT OF APPEAL FOURTH DISTRICT

PONCA TRIBE OF NEBRASKA et al., Petitioner,
v.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, Respondent;
CALIFORNIA DEPARTMENT OF INSURANCE, et al., Real Parties in Interest

E035007
(Super.Ct.No. INC37724)
The County of Riverside

THE COURT

The petition for writ of mandate/prohibition and request for stay is DENIED. The stay previously ordered on December 31, 2003 is dissolved.

S/ KING
Acting P.J.

Court of Appeal, Fourth Appellate District, Division Two –
No. E035007
S122025

IN THE SUPREME COURT OF CALIFORNIA
En Bank

PONCA TRIBE OF NEBRASKA et al., Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF RIVERSIDE,
Respondent;
CALIFORNIA DEPARTMENT OF INSURANCE et al.,
Real Parties in Interest

Application for stay and petition for review DENIED.

George, C.J., was absent and did not participate.

SUPREME COURT
FILED
FEB - 4 2004
Frederick K. Ohlrich Clerk
Deputy

s/ WERDEGAR
Acting Chief Justice